IN THE UNITED STATES COURT OF FEDERAL CLAIMS

TETRA TECH, INC., a Delaware corporation, Plaintiff, v. THE UNITED STATES, Defendant.	No. 14-619C (Judge Bush)

MOTION TO JOIN TETRA TECH EC, INC. AS PLAINTIFF

Pursuant to the Court's January 31, 2017 Order and RCFC 17 (and 15, 19 and 20), Plaintiff Tetra Tech, Inc. ("Plaintiff" or "Inc.") moves the Court for joinder of Plaintiff's wholly-owned subsidiary and business unit Tetra Tech EC, Inc. ("EC") as a plaintiff in this action. In support of this Motion, Plaintiff relies upon the points and authorities set forth below, the Declarations of Richard A. Lemmon and Donald A. Hawkins filed herewith, and the pleadings and file herein.

I. Introduction

This action had been pending for more than two years and all fact discovery had been completed before the Government first raised the question of whether the real party interest might be EC rather than Plaintiff. At that time and during multiple communications during the weeks that followed, Government counsel only expressed the concern that the Government wanted to ensure it was not exposed to double liability. Since the issue was first raised, Plaintiff has consistently offered to join EC as a plaintiff in order to address any risk of such double liability. Though the Government has since strategically changed its position and reasoning, the fact remains that joinder of EC is the appropriate procedural mechanism to address the well-established purposes of RCFC 17, to best preserve the resources of the parties and the Court, and to serve the interests of justice.

///

II. Legal Standards

RCFC 17(a) "'sets forth the broad and general principle that actions should be brought in the name of the real party in interest and that courts should be lenient in permitting ratification, joinder, or substitution of that party.'" *Holland v. United States*, 62 Fed. Cl. 395, 401 (2004) (quoting *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999)). "A real party in interest, within the context of RCFC 17(a), is the party that 'possesses the substantive right under which suit is brought.'" *Hemphill Contractor Co. v. United States*, 34 Fed Cl. 82, 85 (1995) (quoting *Wall Indus. v. United States*, 15 Cl. Ct. 796, 803 (1988)); *Grass Valley Terrace v. United States*, 69 Fed. Cl. 543, 546 (2006) (citation omitted) ("[w]ithin the context of RCFC 17(a), a real party in interest has been defined as the party that 'possesses the right to be enforced.'").

Moreover, RCFC 17(a)(3) provides:

> The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

RCFC 17(a)(3).

Authorities explain that the principal purposes of RCFC 17 are to protect the Government "from multiple liability in actions by subsequent claimants and also [in] ensur[ing] that the judgment in the action will have res judicata effect." *Sys. Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 170 (2005) (citations omitted); *see also Holland*, 62 Fed. Cl. at 401 (quoting Advisory Committee Notes to nearly identical Fed. R. Civ. P. 17 "that the rule 'is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made,'" and to "'insure against forfeiture and injustice'").

A review of the general joinder Rules is also instructive and consistent with the purposes and policies set forth above. RCFC 19(a)(1) requires joinder if:

(A) In that person's absence, the court cannot afford complete relief among existing parties; or
(B) That person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: . . .
(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

RCFC 19(a)(1).

RCFC 20, which governs permissive joinder provides:

(1) Persons may be join in one action as plaintiffs if:
(A) They assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
(B) Any question of law or fact common to all plaintiffs will arise in the action.
(2) . . .
(3) A plaintiff need not be interested in obtaining all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights.

RCFC 20(a).

III. Discussion

A. Joinder of EC as a plaintiff is appropriate, does not prejudice the Government and serves the purposes of RCFC 17.

The Court has articulated three factors to consider when determining whether to allow joinder: (1) whether the defendant will be prejudiced, (2) whether the factual allegations of the complaint will change, and (3) whether the defendant is aware of the relevant parties. *Holland*, 62 Fed. Cl. at 401-402 (citing *DePonte Inves., Inc. v. United States*, 60 Fed. Cl. 9, 10 (2004) and *First Annapolis Bancorp, Inc. v. United States*, 54 Fed. Cl. 529, 542 (2002)). Each factor firmly supports allowing joinder in this action.

1. Joinder will not prejudice the Government.

First, Defendant will suffer no prejudice if EC is joined. As an initial matter, it is important to keep in mind the purposes of RCFC 17 and that Courts are extremely lenient in allowing ratification, substitution and joinder under RCFC 17. *See, e.g.*, *First Hartford Corp. Pension Plan & Trust* 194 F.3d at 1289; *Hemphill Contractor Co.*, 34 Fed Cl. at 85.

For example, in *Hemphill Contractor Co*., the action was initiated in the name of "Hemphill Contracting Company, Inc.," and the Government moved to dismiss for lack of standing because that entity was administratively dissolved in its state of incorporation and was not active at the time the Complaint was filed (and was also incorporated years after the subject government contracts were awarded). *Hemphill Contractor Co.*, 34 Fed. Cl. at 83-84. The Government argued that a different (though related) corporation named "Hemphill Contracting Co., Inc." was the real party in interest. *Id*. Though the Court agreed that the originally named plaintiff was not the real party in interest (since it did not exist as a corporation at the time the Complaint was filed), the Court refused to dismiss and allowed for amendment of the Complaint to correct the name of the plaintiff. *Id.* at 85, 87. The Court noted that "[t]he claims asserted in the instant complaint are real; **it is clear that some party possesses the substantive right to sue here**. It is equally clear that no other corporate entity, other than Hemphill Co., could possess this right . . . ." *Id*. at 85 (bold added, italics in original). The Court was persuaded by the fact that the real party in interest and the originally named plaintiff corporation were both owned and operated by the same individuals. *Id*. at 85-86 ("Plaintiff is the only party which is capable of representing the interests of Hemphill Co., the real party in interest. . . . Mr. Hemphill, as the incorporator of Hemphill Co., has maintained the same corporation, comprised of the same individuals, with similar business interests."). The Court also found it relevant that the plaintiff referred to itself as both names in the pleadings and underlying documents. *Id*. at 86. The Court reasoned:

> ***A little common sense goes a long way to show that the complaint contains a mere misnomer, and that Hemphill Co. and the plaintiff are one and the same.*** The court finds it difficult to believe that plaintiff would intentionally misname itself on the complaint, knowing that Hemphill Company did not exist. . . . Further, the disparity between the disputed corporation names is characterized more as a very thin crack than a chasm. In much of this Nation "Co." is a well-known abbreviation for "Company." ***There is a strong judicial policy toward merit-based decisions, and against throwing out claims because of a minor technicality***.

Id. at 86 (emphasis added). The Court concluded that "an amendment of the original pleading will not affect the government's case, but it will allow the parties and this court to finally get to the merits of this case." *Id*. at 87.

The Court reached a similar decision and allowed joinder of a related corporate plaintiff in *Textainer Equip. Mgmt. v. United States*, Case No. 08-610C , 2013 U.S. Claims LEXIS 436 (Fed. Cl. May 15, 2013). In that takings case, well after the case was initiated and following multiple rounds of summary judgment motions, issues arose as to whether one of the originally named plaintiffs (Textainer) had standing when it was discovered that the party on behalf of which Textainer had brought the action (Green Eagle) was not, as originally understood, the successor-in-interest of the original property owner (Capital). *Id*. at *2-10. At one point, the Court allowed joinder of Green Eagle as the real party in interest to Textainer's takings claim based, in part, on the belief that Capital no longer existed. *Id*. at *9. In a later round of briefing, Textainer/Green Eagle discovered that Capital had not been dissolved, but still existed as a wholly-owned subsidiary of Green Eagle located in the Netherlands (though it had no operations, no employees, no assets, no contingent claims, no receivables and performed no business functions). *Id*. at *11. Based on that information, Textainer/Green Eagle moved to join Capital or, in the alternative, to allow Capital to ratify the actions of the other related parties. *Id*. at *12. The Court allowed joinder, holding:

> Tested by these principles, including the lenient standard outlined by the Federal Circuit, the court finds that joinder of Capital is appropriate in this case. Joinder serves the fundamental purpose of RCFC 17 in protecting the government "from multiple liability in actions by subsequent claimants and also [in] ensur[ing] that the judgment in the action will have res judicata effect." Specifically, joining Capital in this case ensures that the United States will not be subject to multiple suits based on Capital's takings claim. In addition, the court finds that determining the real party in interest in this case has been difficult. This case involves international corporations with convoluted corporate structures which are subject to the laws of various jurisdictions, making the determination of ownership of the subject containers after the sale to Green Eagle complicated. As such, plaintiffs' errors in identifying the real party in interest are understandable and do not justify an outright denial of plaintiffs' motion. The record demonstrates that plaintiffs have never "hidden the ball," but have promptly corrected their errors in identifying

> the real party in interest in this case and promptly moving for joinder of Capital once the relevant facts regarding its continued corporate existence came to light. . . .
>
> In addition, joinder . . . will not enlarge the facts or nature of the government's liability in this case. . . . Most importantly, the government has been aware of Capital's interest in the containers from the beginning of this action . . . and the government did not raise any objections until years into this litigation.

Id. at *17-19 (citations omitted, emphasis added).

Similar purposes are set forth as bases for joinder under RCFC 19 and 20. Rule 19(a)(1) provides as one basis for joinder that failure to join could leave an existing party subject to a substantial risk of incurring multiple or inconsistent obligations. Even if the mandatory joinder provisions of RCFC 19 did not apply, which they should, permissive joinder is appropriate under RCFC 20(a), since Plaintiff and EC would essentially be asserting rights to pursue the subject pass-through claims jointly, severally or in the alternative arising out of the same transaction, occurrence, or series of transactions or occurrences and there are numerous common questions of law and fact involving those entities. Any concern to the Government about having two plaintiffs could be addressed through appropriate protections (as expressly contemplated by RCFC 20(b)) and, ultimately, "the Court may grant judgment to one or more Plaintiffs according to their rights" (as expressly allowed under RCFC 20(a)(3)).

Just like in the *Hemphill Contractor Co*. case, "[t]he claims asserted in the instant complaint are real; it is clear that *some* party possesses the substantive right to sue here" and "[i]t is equally clear that no other corporate entity, other than [EC and Inc.] could possess this right . . . ." *Hemphill Contractor Co.*, 34 Fed. Cl. at 85 (emphasis in original). Joinder of EC would not result in any prejudice to the Government, as it now takes the position that EC is technically the specific corporate entity with which it contracted (even though the Government's Answer admitted that it contracted with Inc. and the Project documents and the Government's own communications were alternatively with Inc. and simply with "Tetra Tech"). In short, the Government was at all times dealing with the same group of people, who were (and continue to

be) affiliated with and operating on behalf of both Inc. and its wholly-owned subsidiary business unit EC.

On the other hand, refusal to allow joinder (or ratification) would operate as a substantial hardship on the Tetra Tech entities and RSCI, defeat the interests of justice and require a great deal of duplicated effort, expense and delay for the parties and the Court. For example, denial of the current Motion may necessitate the precautionary filing of a separate (though substantively identical) REA expressly and specifically in the name of EC. That course would effectively require both parties to "start from scratch" with the claim and litigation process, which would result in extra expense and delay to the parties and duplication of efforts in this Court. Such results flowing from a minor technicality regarding the named Plaintiff are exactly the type of form over substance that RCFC 17 is designed to avoid. *Hemphill Contractor Co*., 34 Fed. at 86 ("***There is a strong judicial policy toward merit-based decisions, and against throwing out claims because of a minor technicality***.") (emphasis added).

2. None of the claims or material factual allegations will change. The only change will be the addition of one named plaintiff.

Second, with the exception of the addition of the formal corporate name of the new party, joinder will not change any of the material factual allegations of the Complaint.

With respect to the legal principles that will be involved, two legal concepts – contractual privity and Delaware's agency theory -- are consistent with allowing joinder and proceeding with both Plaintiffs. First, as a general proposition, the real party in interest is the party that had the contract (i.e., was in privity) with the Government. *Hemphill Contractor Co. v. U.S*., 34 Fed Cl. 82 (1995). Here, the party whose name appears on the Task Order is "Tetra Tech EC, Inc." Hawkins Decl., Ex. E. But, the evidence will reflect that EC submitted the bid at the direction and on behalf of its parent Inc. Hawkins Decl. at ¶ 6. However, even if the Court determines that EC is the one (and only) real party in interest in privity with the Government, that does not

mean that Inc. cannot also continue as a party, since it so directly serves the purposes of RCFC 17 and is consistent with that Rule and RCFC 19 and 20.

For one thing, under applicable corporate law of Delaware,[1] the acts of the subsidiary corporation can be attributed to the parent, and vice versa, where one corporation was acting on behalf of the other, where there is a close relationship between the corporations and/or where the companies are two arms of the same business group acting in concert with each other. Delaware's agency theory "attributes specific acts to the parent because of the parent's authorization of those acts. " *C.R. Bard, Inc. v. Guidant Corp.,* 997 F. Supp. 556, 560 (D. Del. 1998) (citing *Stinnes Interoil, Inc. v. Petrokey Corp.,* No. 82C-JN-109, 1983 Del. Super. LEXIS 829, at *2 (Del. Super. Ct. Aug. 24, 1983)). It requires "an arrangement . . . between the two corporations so that one acts on behalf of the other and within usual agency principles, " and that "the arrangement [ ] be relevant to the plaintiff's claim of wrongdoing." *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc*., 842 F.2d 1466, 1477 (3d Cir. 1988).

"Under Delaware law, proof of agency within the context of a parent-subsidiary relationship requires that the plaintiff 'demonstrate that the agent was acting on behalf of the principal and that the cause of action arises out of that relationship."' *Jurimex Kommerz Transit G.M.B.H. v. Case Corp.,* 65 F. App'x 803, 808 (3d Cir. 2003) (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187, 198 (3d Cir. 2001)).

The corporate identity of the parent company is preserved under the agency theory, but the parent nevertheless "is held for the acts of the [subsidiary] agent" because the subsidiary was acting on the parent's behalf. *F. Hoffman-La Roche, Ltd. v. Superior Court*, 30 Cal. Rptr. 3d 407, 418 (Cal. Ct. App. 2005) (internal quotation marks omitted); *Wesley-Jessen Corp. v. Pilkinqton Visioncare, Inc.,* 863 F. Supp. 186, 188-89 (D. Del. 1993) ("This [agency] theory does

[1] Both Inc. and EC are Delaware corporations. Lemmon Decl. at ¶ 3. RCFC 17(b)(2) provides that "capacity to sue and be sued is determined . . . for a corporation, by the law under which it was organized."

not treat the parent and subsidiary as one entity, but rather attributes specific acts to the parent because of the parent's authorization of those acts. ").

The agency theory may be applied not only to parents and subsidiaries, but also to companies that are "two arms of the same business group, " operate in concert with each other, and enter into agreements with each other that are nearer than arm's length. *See Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.,* 863 F. Supp. 186, 188-89 (D. Del. 1993).

Here, the evidence will show that Inc.'s and EC's routine business practices generally, and their respective particular actions in connection with the subject Project, were at all material times taken on behalf and at the direction of the other in their roles as parent and wholly-owned subsidiary, and as business units of the same company. Lemmon Decl. at ¶¶ 3-9; Hawkins Decl. at ¶¶ 5-6. As such, under the Delaware corporate agency theory, acts taken in the name of one entity bind the other. This agency theory not only relates to the prime contract with the Government, but also the subcontract relationship with RSCI giving rise to the pass-through claims at issue. *Id*.; see also Hawkins Decl. at ¶¶ 9-13, 15-18, 24.

Furthermore, the issue of privity downstream with RSCI will neither support a dispositive motion by the Government nor preclude the substantive pass-through claims at issue in this action. Regardless of whether the Court determines that the real party in interest is Inc., EC or both, such Plaintiff(s) may properly pass through RSCI's claims to the Government. As an initial matter, if joinder of EC is allowed, then every potential combination will be accounted for and all potentially interested entities will be parties and bound by the Court's decisions. The evidence will reveal that, during the Project and through the first two years of this action, all parties (including the Government) understood that the same group of individuals at "Tetra Tech" (whether nominally doing business as Inc. or its wholly-owned subsidiary and business unit EC) had both the prime contract with the Government and the subcontract with RSCI. Hawkins Decl. at ¶¶ 5-6, 9-13, 15-18, 24. It would make little sense, as a practical matter, for RSCI's subcontract to be with any other entity.

Just like the multiple Government documents and correspondence addressed to the generic "Tetra Tech," the Subcontract Agreement is between RSCI and "Tetra Tech," without distinguishing between EC and Inc. Hawkins Decl. at ¶ 9, Ex. F. That Subcontract Agreement identifies the subject Task Order by number and Project by name, and expressly provides for RSCI's claims to be passed-through to the Government and sponsored by Tetra Tech. *Id*. As this Court repeatedly states, "[t]he intent of the parties controls contract interpretation, and the 'primary purpose of the court is to ascertain the intent of the parties to a contract.'" *Northrop Grumman Corp. v. United States*, 50 Fed. Cl. 443, 458 (2001) (Bush, J.). It would make no sense for the parties to intend anything other than for RSCI to be in privity with the prime contractor in privity with the Government.[2]

Especially in light of the parent-subsidiary relationship between Inc. and EC, under Delaware's agency theory, the Tetra Tech entities were at all times acting by and on behalf of each other. In other words, even if the Court determined that the "Tetra Tech" referenced in the Subcontract Agreement was intended to mean Inc., but that only EC had a contract with the Government, applicable law still supports holding both entities (including EC) liable to RSCI (for any recovery from the Government). In the alternative, RSCI had an *implied* contract with the party in privity with the Government, since it performed the majority of the work on the Project, including the extra work that gives rise to the REA. Hawkins Decl. at ¶¶ 9-10, 16-17, 20, 24. At the very least, there are genuine disputes of fact that would preclude entry of summary judgment on these issues.

///

///

[2] Even if the Court were to determine, as a matter of law and despite the multiple fact issues, that the Subcontract Agreement was really with one and only one of EC and Inc. (but not the other) and that the *other* entity was the only one in privity with the Government, there would be nothing to prevent that entity from assigning its rights under the Subcontract Agreement to the other for purposes of continuing pursuit of the pass-through claims. Applicable anti-assignment acts do not prohibit assigning subcontracts in that manner. The Government will still have subcontract performance by the same subcontractor, RSCI.

3. The Government has been at all times aware of both Plaintiff and EC.

Third, there is no question that the Government is well aware of both Plaintiff and EC, as is confirmed in the Project documentation and in the Government's pleadings and discovery requests during this action. The evidence will reflect that, though the Task Order with the Government is in the name of EC, during the course of the Project and claims process, the parties (including the Government) often referred to the Prime Contractor not as EC, but as Inc. or, more often, simply as "Tetra Tech." The following are a few examples of such references during the Project, which illustrate that: (a) the parties (including the Government and RSCI) were at all times dealing with the same group of Tetra Tech representatives (acting on behalf of both Inc. and its wholly-owned subsidiary and business unit EC), but (b) were inconsistent in how they referred to the Tetra Tech entity serving as Prime Contractor (again, usually simply referring to that entity as "Tetra Tech," but also referring to it as Inc.). All referenced documents are Exhibits to the Hawkins Declaration filed herewith. For example:

- In response to EC's bid, GSA sent a letter, dated October 22, 2010, accepting the offer. Such letter was addressed to "Tetra Tech" (not expressly to "Inc." or "EC") to the attention of Mark Nakatani. Exhibit D. The same letter requested the return of several documents, including Payment and Performance Bonds, and Standard Form 1413 ("Statement and Acknowledgment") executed for all subcontractors. *Id.* at 2.

- On or about October 22, 2010, GSA issued the Order for Supplies and Services ("Task Order") for the Project, which lists EC as "Contractor." Exhibit E.

- On or about November 23, 2010, "Tetra Tech" entered into its Standard Form Subcontract ("Subcontract Agreement") for the Project with RSCI, which was signed by Mark Nakatani on behalf of "Tetra Tech." The Subcontract Agreement contained a provision (at ¶ 32(b)) contemplating the *Severin*-compliant pass-through to GSA of claims for extras and equitable adjustments arising from RSCI's work. Exhibit F.

- In connection with executing the Subcontract Agreement, the parties also executed a Statement and Acknowledgement (Standard Form 1413) for the Project, which lists the "Prime Contractor" as "Tetra Tech" and RSCI as the "Subcontractor." It is signed on behalf of "Tetra Tech" by Mark Nakatani. Exhibit G.

- On or about November 2, 2010, Payment and Performance Bonds for the Project were posted, which identified EC as the Principal. Exhibit H.

- Effective November 10, 2010, GSA issued the Notice to Proceed for the Project addressed to "Tetra Tech" to the attention of Mark Nakatani. On or about November 12, 2010, Mr. Nakatani completed and signed the NTP receipt on behalf of Inc. (as "Contractor"). Exhibit I.

- On or about March 17, 2011, Howard Rickard (on behalf of Inc.) signed and returned to GSA a Statement and Acknowledgement (on Standard Form 1413) in connection with the Project, which identified the "Prime Contractor" as Inc. and the "Subcontractor" as RSCI. Exhibit J.

- In general and during the subject Project, all revenues (including Project payments from GSA) received by EC were attributed to Inc. Similarly, all obligations of EC were discharged/paid by Inc. as its parent, including payments to RSCI for its work on the Project. The books of account for EC and Inc. are and were maintained consistent with this understanding. Hawkins Decl. at ¶ 18.

- On or about June 7, 2013, a Request for Equitable Adjustment ("REA") arising from this Project was submitted to GSA. The transmittal letter is signed by Mark Nakatani on behalf of Inc. The Certification page of the REA is signed by Mark Nakatani on

behalf of "Tetra Tech," and certifying the "claim on behalf of the Contractor."[3] Exhibit K.

- On March 22, 2013, the GSA sent a letter responding to the REA addressed to "Tetra Tech" to the attention of Mark Nakatani. Exhibit L.

- On May 30, 2014, the GSA sent a letter setting forth the Contracting Officer's final decision ("COD") on the REA, which letter was addressed to "Tetra Tech" to the attention of Mark Nakatani. Exhibit N.

- On or about June 17, 2014, Inc. and RSCI entered into a separate, formal *Severin*-Compliant Pass-Through Agreement in connection with the Project and REA. Inc. entered into that Agreement as the parent and on behalf of EC, specifically in contemplation of the pursuit of claims as set forth in the REA related to this Project. Hawkins Decl. at ¶ 24, Exhibit O.

Similarly, during this action, Government counsel has been well aware of the existence and involvement of both EC and Inc. In its Answer to the Complaint (Doc. 9), the Government (in paragraph 4) "Admits the allegations contained in paragraph 4, sentence 1, that plaintiff and defendant entered into a Government designed construction contract . . . ." . The first sentence of paragraph 4 of the Complaint (ECF No. 1) identifies Inc. as the Plaintiff and alleges that Inc.

[3] "Appendix 2" to the REA included an index and copies of dozens of relevant correspondence and e-mails between the parties related to the claims. That group of correspondence included 13 letters on GSA letterhead directed to the prime contractor. Of those thirteen (13) letters, five (5) were addressed to simply "Tetra Tech," one (1) was addressed to Inc., and seven (7) were addressed to EC. Within Appendix 2 to the REA were thirty-one (31) serial letters on "Tetra Tech" letterhead, which include twenty-nine (29) reflecting signature blocks for Inc., two (2) reflecting merely "Tetra Tech," and zero (0) identifying the sender as EC. A copy of Appendix 2 to the REA, with notations indicating which of the above-referenced letters are nominally from or to which Tetra Tech entity is attached to the Stewart Decl. as Exhibit 1. Essentially all of the aforementioned letters are to or from Mark Nakatani or Howard Rickard.

was the party with the contract with the United States in connection with the Project. Complaint (ECF No. 1) at 1.

As discussed in the earlier-filed Status Report, counsel for the Government first raised the EC / Inc. issue on September 20, 2016, at that time indicating that the Government's sole concern was to avoid a double recovery (i.e., liability to Inc. in this action and potential separate liability to EC). The Government's attorney has since questioned at least one fact witness about the relationship between EC and Inc. and each entity's involvement in the underlying events giving rise to the action. The Government and its counsel have long been in possession of the relevant Project-related documents (including those referenced above repeatedly referring to Inc. and less often to EC), and received the majority of Plaintiff's document production in this action during the summer of 2015. The existence and involvement of Inc. and EC is nothing new to the Government, which further supports allowing the formal joinder of EC.

B. In the alternative, the Court should allow EC and Inc. to ratify each other's actions in connection with the Project, Task Order, *Severin*-Compliant Pass-Through Agreement, the REA and this action.

Plaintiff submits that joinder of EC is the appropriate and most efficient approach to best serve the purposes of RCFC 17 and the interests of justice. However, if the Court is not inclined to allow joinder, then Plaintiff respectfully requests that the Court allow any real party in interest concerns or uncertainty to be addressed via ratification pursuant to RCFC 17. RCFC 17(a)(2) provides for "the real party in interest to ratify . . . the action," and "[a]fter ratification, . . . the action proceeds as if it had been originally commenced by the real party in interest." RCFC 17(a)(2).

In the Declaration of Richard A. Lemmon, who is a Senior Vice President of Inc. and an Executive Vice President of EC, he (on behalf of both companies) expressly ratifies all agreements and actions taken formally or informally by both EC and Inc. in connection with the Task Order, Subcontract Agreement, REA, *Severin*-compliant pass-through Agreement and in this action. Lemmon Decl. at ¶ 11. Both EC and Inc. also agree to be bound by and abide by all

determinations, rulings, orders and judgments entered in this action, even if only Inc. proceeds as the named Plaintiff in this action. *Id*. Like joinder, such ratification would also directly serve the dual purposes of RCFC 17 and the interests of justice and judicial economy.

IV. Conclusion

Based on the foregoing, the Court should enter an order allowing Tetra Tech EC, Inc. to be joined as a plaintiff in this action and granting leave for Plaintiffs to file an amended complaint effectuating that joinder. In the alternative, to the extent the Court determines that EC is the only real party in interest, then the Court should enter an order allowing Tetra Tech EC, Inc. to ratify the continuation of this action in the name of Inc. as Plaintiff.

Respectfully submitted,

DATED: February 24, 2017.

STEWART SOKOL & LARKIN LLC

By: */s/ John Spencer Stewart*

John Spencer Stewart
2300 SW First Avenue, Suite 200
Portland, OR 97201-5047
Phone: (503) 221-0699
Fax: (503) 223-5706
Email: jstewart@lawssl.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **MOTION TO JOIN TETRA TECH EC, INC. AS PLAINTIFF** on:

Anand R. Sambhwani
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
PO Box 480
Ben Franklin Station
Washington, DC 20044
anand.r.sambhwani@usdoj.gov

by the following indicated method or methods:

☑ by **E-filing** a full, true and correct copy thereof to the attorney, as shown above, at the electronic mail address reflected on the court's CM/ECF system, on the date set forth below.

DATED this 24th day of February 2017.

STEWART SOKOL & LARKIN LLC

By: */s/ John Spencer Stewart*
John Spencer Stewart
2300 SW First Avenue, Suite 200
Portland, OR 97201-5047
Phone: (503) 221-0699
Fax: (503) 223-5706
Email: jstewart@lawssl.com
Attorneys for Plaintiff